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# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

No. [redacted]
156

LEE W. TAUFERNER and
CAROLYN E. TAUFERNER,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

EKS AYN ANDERSON
608 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

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# IN THE SUPREME COURT OF THE UNITED STATES

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LEE W. TAUFERNER and
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vs.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

Petitioners Lee W. Tauferner and Carolyn E. Tauferner pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on February 24, 1969.

## CITATIONS TO OPINIONS BELOW

The opinion in this case by the United States Court of Appeals for the Tenth Circuit (reported at 407 F.2d 243) is appended hereto as Appendix A. The decision of the United States District Court for the District of Utah is reported at ..... F. Sup. ....., 21 AFTR 2d 856, and appended hereto as Appendix B.

The opinion of the Ninth Circuit in the case of *Wright v.*

*Hartsell,* reported at 305 F.2d 221, 10 AFTR 2d 5144, is appended hereto as Appendix C.

The opinion of the Supreme Court in *Commissioner v. Flowers,* reported at 326 U.S. 465, 66 S. Ct. 482, 34 AFTR 301, is appended hereto as Appendix D.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered February 24, 1969. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. Whether the taxpayer who was required to live a substantial distance from the Thiokol plant which was located in a remote area away from any community because of the hazardous nature of its work, who was not permitted, and was unable due to unavailability of living facilities, to live near the plant, and who was required to travel a substantial distance beyond the nearest habitable place due to the exigencies of the business rather than his personal conveniences and not due to his desire to maintain a home away from the employer's plant—whether such a taxpayer is entitled to deduct the cost of such transportation from the nearest habitable place to his place of employment as an ordinary and necessary expense incurred in carrying on his business, pursuant to Section 162(a) of the Internal Revenue Code of 1954.

2. Whether the taxpayer, as described above, is entitled to deduct such costs of transportation from the nearest habitable place as a travel expense while in the pursuit of his business away from home pursuant to Section 162(a)(2) of the Internal Revenue Code of 1954.

## STATUTE INVOLVED

The statute involved in this case is Section 162(a) of the Internal Revenue Code of 1954, 26 U.S.C. Section 162(a), which is as follows:—

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> "(a) In General.—There shall be allowed as a deduction all the orinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including —
>
> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;
>
> (26 U.S.C. 1964 ed., Sec. 162.)

## STATEMENT OF THE CASE

This case involves federal income taxes for the years 1961 and 1962. An action for refund was brought in the District Court for the District of Utah after the taxes had been paid on a deficiency notice and a claim for refund was denied. The District Court gave judgment to the taxpayers, and the Tenth Circuit Court reversed. It is to obtain a review of the Circuit Court decision that this Petition is filed.

The taxpayer was employed by the Thiokol Chemical Corporation as a contracts administrator beginning in May, 1961, and continuing through the years involved. His employment was of an indefinite, as distinguished from a temporary nature. (R. 42)[1]

The Thiokol Chemical plant is located in a remote area away from any community because of the hazardous nature

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[1] "A" references are to the pages of the record on appeal as prepared and numbered by the Clerk of the District Court.

of its business activities, namely, the manufacture and testing of solid fuel rocket engines. The taxpayer was not permitted to live at the plant site, but tried to be as close as possible to his employment. He attempted, unsuccessfully, to buy a home in Corrine, Utah, located 20 miles from the plant, when he first began work there. Thereafter, he bought a home in Brigham City, Utah, located 27 miles from the plant, and has lived there since with his family. (R. 42, 67.) It was stipulated that Corinne was the nearest habitable place to the plant site. (R. 43)

While taxpayer was fortunate to have been able to use the bus service during the years involved, at a cost of seventy cents per round trip, there was not adequate public transportation from Brigham City and particularly not from Corinne to the Thiokol plant. (R. 43-44, 77-78)

It is claimed that the cost of transportation between the nearest habitable place to his place of employment was deductible as an ordinary and necessary expense incurred in carrying on his business pursuant to Section 162(a) of the Internal Revenue Code of 1954, and also as a travel expense while in pursuit of his business away from home, pursuant to Section 162(a)2, upon authority of *Wright v. Hartsell*, supra.

## ARGUMENT

The Tenth Circuit Court of Appeals has rendered a decision in this case in conflict with the decision of the Ninth Circuit Court on the same matter.

The Tenth Circuit Court has decided a Federal question in this case which is in conflict with the applicable decisions of the United States Supreme Court.

The situation presented by this petition is as follows:

1. In this case the taxpayer below, Tauferner, lived in Brigham City, Utah, and was required to travel to his place of business at the Thiokol Chemical plant site which was located in a remote area due to the hazardous nature of its business activities and where it was impossible for the taxpayer to live. The nearest habitable place was Corrine, Utah, which was 20 miles away from the plant site. The lower court allowed the deduction for the cost of transportation for the entire distance from Brigham City to the plant site.

In the appeal by the government to the Tenth Circuit Court, Tauferner conceded the requirement of mitigation of expense and urged the adoption of an objective rule, as in *Wright v. Hartsell*, based upon the nearest habitable place limitation, urging that such part of the cost of transportation between the nearest habitable place and the more distant place of business is deductible as being ordinary and necessary expense in carrying on a trade or business, being the business of the employee.

In its decision the Tenth Circuit reversed and denied any deduction whatever. Not only did the Tenth Circuit reject the idea of an allowance for the cost of travel between the nearest habitable place and the place of business, but completely rejected any idea of any factor under any circumstances, for the deduction of any part of the cost of travel ". . . when the taxpayer is going to the place where he begins work or is returning from the place where he ceases work . . ." The Tenth Circuit said that "the nature of the work engaged in, the distance traveled, the mode of transportation, the degree of 'necessity' appear to be unsatisfactory guides with any degree of consistency and certainty.

The Tenth Circuit in this case referred to the principle of "necessity" and also cited the Supreme Court case of *Commissioner v. Flowers,* supra, in which this Court stated that "the exigencies of business rather than personal convenience and necessities of the traveler must be the motivating factors." The court also referred to the Supreme Court case in *United States v. Correll,* 389 U.S. 299, in which this Court stated that ". . . any rule in this area must make some rather arbitrary distinctions."

2. The Ninth Circuit in *Wright v. Hartsell,* allowed the taxpayer, an employee construction worker, to deduct part of the cost of transportation in traveling between his home in Pocatello, Idaho ,and the A.E.C. site in the desert 70 miles away. That part which the taxpayer was allowed to deduct was the cost of traveling between Arco, Idaho, and the A.E.C. site, Arco being the nearest habitable place to the plant site, 46 miles away. The court stated that "a taxpayer's inability to live near his job site is a valid ground for deduction as travel expense of the resulting cost of his transportation . . ." The court further stated that "the fundamental question in determining if an expense claimed as travel expense is incurred as a matter of choice or is dictated by the 'exigencies of business' is whether it would be reasonable for the particular taxpayer to move his home nearer the place where he is working."

The expression "exigencies of business" was quoted from the United States Supreme Court case *Flowers v. Commissioner,* supra, in which this Court said that "the exigencies of business rather than the personal convenience and necessities of this taxpayer must be the motivating factor."

The allowance from Arco only was on the principle of mitigation of expense by requiring that the taxpayer move as near to the job site as is reasonable and that the amount

of deduction is gauged in that light.

3. The United States Supreme Court in the case of *Commissioner v. Flowers,* (1945),326 U.S. 465, 66 S. Ct. 250 (34 AFTR 301) used language on the subject of the cost of transportation in connection with the pursuit or carrying on of a trade or business, with which language the Tenth Circuit decision in this Tauferner case is in conflict. The *Flowers* case involved an attorney who preferred to live in Jackson, Mississippi, and who traveled to Mobile, Alabama, where he worked for the railroad company as its general counsel, The taxpayer was unwilling to move from Jackson to Mobile even though as the court held, the taxpayer's principal post of business was at the main office in Mobile. The Court supported the Commissioner in disallowing the cost of the taxpayer's travel from Jackson to Mobile under Section 23 of the Code, the predecessor Section 162 of the 1954 Code.

The Supreme Court commented upon the extra cost involved in traveling from Jackson to Mobile as being ". . . unnecessary and inappropriate to the development of the railroad's business" and as being ". . . solely as the result of the *taxpayer's desire* to maintain a home in Jackson while working in Mobile . . ." (see D.11. Emphasis added) and then concluded as follows:

> "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors."

It was stated in *Flowers,* at page 252, that the predecessor of Section 162(a) (2) "is one of the specific examples given by Congress in that section of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (The latter is the predecessor of Sec. 162(a).)

4. In *Tauferner* the Court said that the Ninth Circuit departed from *Hartsell* in *Smith v. Warren*, 338 F.2d 671, 21 AFTR 625 (1968). The Tenth Circuit recognized that the Court in *Smith v. Warren* did not discuss or cite its prior case of *Hartsell*, but instead based its decision on the Fifth Circuit cases of *Steinhort v. Commissioner*, 335 F.2d 496, 14 AFTR 2d 5433, and *Heuer v. Commissioner*, 283 F.2nd 865. All of these cases involved ship pilots who were not allowed to deduct the cost of travel from home to their first assignments and return home from the last assignments.

It is suggested, however, that the Ninth Circuit had in mind the distinguishing factor in *Smith v. Warren* when it did not refer to *Hartsell*, that being the element of preference in *Smith v. Warren*. The court said at page 673:

> "Appellant's position was not essentially different from that of other taxpayers, particularly those engaged in the professions, who, for personal reasons sufficient to themselves, *prefer* to live in the suburbs. . . ." (Emphasis added)

In the later of the Fifth Circuit cases, *Steinhort*, where the taxpayer lived at a point varying from 1 mile to 59.75 miles from the various docking facilities, that Court, while holding against the taxpayer, made a significant contribution to the subject of what constitutes non-deductible commuting. On page 501 of 335 F.2d it referred to the "true blue, metropolitan commuter who chooses for family and personal considerations to live in a far off suburb rather than a close-by city apartment . . ." It also said in note 24 on page 502:

> ". . . The 'temporary,' 'indeterminate' distinction, although of great use in determining deductibility of expenses under Sec. 162(a)(2) where work is done in another district locality, does not cut into the principle

of denying a deduction for 'commuting expenses' for travel *within the same metropolitan area* as the taxpayer's established home." (Emphasis added)

That stated principle of "metropolitan area" as a basis and definition of "commuting" does not conflict with the position herein of the taxpayer, Tauferner. On the other hand it fortifies Tauferner's position. It certainly could not be said that the Thiokol plant, located in a remote area away from any community, is in the metropolitan area of Brigham City or the nearest habitable place, Corinne.

Webster's International Dictionary (Third Edition) defines "metropolitan" as "relating to or constituting a region including a city and the densely populated surrounding areas that are socially and economically integrated with it."

The Supreme Court case of *U.S. v. Correll,* 88 S. Ct. 445, 20 AFTR 2d 5845, was cited by the Tenth Circuit to establish that "any rule in this area must make some rather arbitrary distinctions."

It is pointed out that the *Correll* case involved the deductibility of meals and the sleep or rest rule. Further, it is respectfully noted that there were three dissents in that case.

*Commissioner v. Bagley,* 344 F.2d 204, 19 AFTR 2d 924, and *Commissioner v. Stidger,* 386 U.S. 287, 19 AFTR 2d 959, cited by the Tenth Circuit, both involved deductions for meals while away from home. In *Bagley* the Court affirmed the proposition that "if a taxpayer *chooses* to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience." (Uage 205. Emphasis added)

*Stidger* also involved a special circumstance, being that of the permanent duty station of a military officer.

5. The Ninth Circuit in *Hartsell* and the Supreme Court in *Flowers* recognized that there may be certain circumstances in which a taxpayer may deduct part of the cost of transportation in traveling between his place of residence and his place of employment. In *Hartsell* that portion allowed as a deduction was the cost of traveling between the nearest habitable place and the place of business. The Ninth Circuit relied on the "exigencies of busness" principle and the language used in the decision in *Flowers* in sustaining its position.

The Tenth Circuit in *Tauferner* precluded any circumstances as justifying the deduction of any part of the cost of transportation between a taxpayer's residence and his place of business, in conflict with the Ninth Circuit in *Hartsell* and in conflict and disregard of the principle and language in the Supreme Court decision in *Flowers*.

It is submitted that there are some proper circumstances under which part of the cost of transportation between one's residence and place of business may be deductible, and that this principle should be stated by the Supreme Court and the conflict resolved. It is submitted further, that the circumstances in this case present such a situation.

6. It is submitted that the distance of 20 miles from Corinne, the nearest habitable place, to the Thiokol plant site is a substantial distance.

Congress has recognized the distance of 20 miles in connection with moving expenses. Section 217 of the Internal Revenue Code (26 U.S.C. Sec. 217) allows a deduction for moving expenses in certain circumtances where the new principal place of work ". . . is at least 20 miles from his former residence." (Sec. 217(c))

## THE QUESTIONS ARE SUBSTANTIAL

Clearly, the questions presented are of importance in the administration of the federal tax laws. There were approximately 2,000 employees at Thiokol in 1967, and the plant is still in operation. Undoubtedly, there are many others throughout the country who are employed at somewhat similarly established plants who have an interest in the resolution of this conflict between the circuits, and also who should have the benefit of a definitive statement by the Supreme Court with respect to the principles set forth in *Commissioner v. Flowers.*

It is submitted that settlement of the questions herein by this Court is plainly in the public interest.

## CONCLUSION

The decision of the Tenth Circuit is in error, being in conflict with the principles and language in *Commisssioner v. Flowers.* Also, it is in direct conflict with the Ninth Circuit decision in *Wright v. Hartsell.* The resolution of such conflict between the Circuits and the decision of this Court is necessary and is in the public interest.

It is respectfully urged that a Writ of Certiorari be granted in this case.

Respectfully submitted,

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*Attorney for Petitioner*

# APPENDIX A

## CITE AS 407 F.2d 243

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

**No. 10113 — February 1969 Term**

Filed February 24, 1969

UNITED STATES OF AMERICA,
*Appellant,*
v.
LEE W. TAUFERNER and CAROLYN E. TAUFERNER,
*Appellees.*

Appeal From The United States District Court For The District of Utah, Central Division (District Court No. C-225-66).

Edward Lee Rogers, Department of Justice, Washington, D.C., (Mitchell Rogovin, Assistant Attorney General, Washington, D. C., Lee A. Jackson, Jonathan S. Cohen, Attorneys, Department of Justice, Washington, D.C., and William T. Thurman, United States Attorney, of Counsel with him on the Brief), for Appellant.

Eks Ayn Anderson, Salt Lake City, for Appellees.

Before LEWIS, HILL, and SETH, Circuit Judges.

SETH, Circuit Judge.

This is an action for refund of income taxes paid on a deficiency assessment for 1961 and 1962. The trial court

entered judgment for the taxpayer, and the Government has taken this appeal. The refund claimed by the taxpayer arose from his deduction of the cost of his daily transportation between his residence at Brigham City, Utah, and the Thiokol Chemical Corporation plant where he worked as a contracts administrator. The deductions were made by the taxpayer as ordinary and necessary business expenses under section 162(a) of the 1954 Internal Revenue Code, and apparently also under section 162(a)(2) as traveling expenses while away from home.

The chemical plant where the taxpayer worked manufactured and tested solid fuel rocket engines, and by reason of the dangers involved was located some distance from any community. The taxpayer was not permitted to live on the plant site, and had attempted to find a place to live at Corinne, Utah, then a small settlement about twenty miles from the plant, but could not do so. He then bought a home in Brigham City about twenty-seven miles from the plant and traveled back and forth usually by public transportation at the rate of seventy cents per round trip. He traveled by car when it was necessary to come or go outside the bus schedule. His employment was regular or permanent and of indefinite duration.

As indicated above, the trial court allowed the deductions, but did not expressly place them in the section 162(a) category or the section 162(a)(2) category. The trial court found that the closer community of Corinne was not to be considered as a possible location for taxpayer's home by reason of its limited facilities.

In substance the Government argues that the expenses of taxpayer in going from his home to the plant site and return were no different than those of any commuter. On the

other hand, the taxpayer urges that these expenses were made necessary by reason of the exigencies of the business of his employer, not by reason of his convenience or preference, and were thus ordinary and necessary business expenses, and were travel expenses away from home under section 162(a)(2).

The expenses here sought to be deducted do not fall within section 162(a)(2) of the 1954 Code as non-personal expenses as construed in Commissioner v. Flowers, 326 U.S. 465 (the then section 23(a)(1)(A), traveling expenses while away from home). The Court there said that:

> "... Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal convenience and necessities of the traveler must be the motivating factors."

The Supreme Court in United States v. Correll, 389 U.S. 299, has held in effect that section 162(a)(2) does not apply to trips not overnight not requiring rest or sleep. The cited case concerned meals rather than travel expenses, and the Court noted that the Commissioner had construed the "away from home" phrase in section 162(a)(2) to exclude all trips requiring neither sleep nor rest, regardless of distance. The Court said:

> "... By so interpreting the statutory phrase, the Commissioner has achieved not only ease and certainty of application but also substantial fairness, for the sleep or rest rule places all one-day travelers on a similar tax footing, rather than discriminating against intracity travelers and commuters, who of course cannot deduct the cost of the meals they eat on the road. See *Commissioner* v. *Flowers*, 326 U.S. 465."

The Court also previously pointed out how the rule was preferable to a case by case approach. It also pointed out that

". . . any rule in this area must make some rather arbitrary distinctions." See also Commissioner v. Stidger, 386 U.S. 287; United States v. Correll, 389 U.S. 299, and Commissioner v. Bagley, 374 F. 2d 204 (1st Cir.). The fact that the travel may or may not have been required or necessary makes no difference under this subsection, and we find it inapplicable to the taxpayer.

But what of section 162(a) generally? The application of this section presents the issue to one of "commuting" versus "ordinary business expense." The terms of themselves are of course not particularly helpful as they are more in the nature of conclusions. As a preliminary point it is well to observe that it is incumbent upon the taxpayer, as we held in United States v. Woodall, 255 F. 2d 370 (10th Cir.), that he place himself clearly inside the bounds of the appropriate section of the Code relating to the deduction he claims.

The taxpayer here presents a strong argument for the deduction by reason of the undisputed fact that his office was at a remote place because of the nature of the plant's product, that he was not permitted to live at the plant site, and that the nearest community was some twenty miles away. The country location, the sparse settlement of the entire area, and the somewhat hazardous nature of the product of the plant give the travel of this taxpayer an overall appearance somewhat different from that of the ordinary suburban commuter. However, the two are basically the same. The factors which are stressed in the taxpayer's argument to develop a distinction are appealing, but are not sufficient to demonstrate a real difference.

The "necessity" of the taxpayer's travel is apparent, at least from the nearest place of habitation to his office. This

"necessity," although perhaps an absolute term, can be developed, and has been developed, in many of the cases concerned with ordinary commuting. This "necessity" arises by reason of the plant location in completely industrialized areas with no available housing, in completely commercial-business areas, or slum areas, in downtown sections of a city, and in infinite variety of other situations where some travel to work is "necessary." These are not in rural surroundings where there is an absence of development as in the case before us, but where there is a complete anti-residential development. The results on the issue presented should not be different in these various fact situations. This "necessity," of course, has gradations from the absolute out in all directions to "advisable," to "preferred," or to "convenient" places to live.

The parties to this appeal urge that the facts place the case either under Wright v. Hartsell, 305 F. 2d 221, of the Ninth Circuit, or under Steinhort v. Commissioner, 335 F. 2d 496, of the Fifth Circuit.

The court in Steinhort v. Commissioner had before it deductions claimed by a ship's pilot who traveled from his home to various docks where he began his duties. The court had previously decided Heuer v. Commissioner, 283 F. 2d 865 (5th Cir.), and Steinhort was its successor. The travel in Heuer and Steinhort was to various locations in the Houston channel area no less required than in the case at bar, and somewhat remote from residential areas. The pilots in the cited cases would report to a different place from day to day to there begin their work. As a matter of "necessity" they thus could not live "near" their work. The "impossibility" was comparable to that in the taxpayer's situation here. The court there refused to allow the deduction of travel cost.

The taxpayer urges that we should follow the Ninth Circuit in Wright v. Hartsell, 305 F. 2d 221. There the taxpayer worked in a remote AEC site covering a large land area and far from any community, the geography being very similar to that in the case at bar. The court there held that the travel expenses to the site were deductible, and the cited decision cannot be effectually distinguished on any factual basis, but the Ninth Circuit in the subsequent case of Smith v. Warren, 388 F. 2d 671, has in our opinion weakened the authority of the Hartsell case.

Smith v. Warren was another ship's pilot case where the court decided that the expenses were not deductible. Assignments of taxpayer there could start at a different place each time and considerable travel was required for him to arrive at the waterfront location where he was needed. The Commissioner had refused to allow deductions claimed under section 162(a) for travel from taxpayer's residence to and from the Seattle waterfront generally on the ground these were personal expenses — commuting expenses. The Ninth Circuit agreed with the Commissioner that these expenses were "commuting" expenses. The court said the case could not be distinguished from Heuer v. Commissioner and Steinhort v. Commissioner. The court did not refer to any "necessary" travel and indicated that the taxpayer lived where he did by preference as do other commuters. The court in Smith v. Warren did not discuss or cite its prior case of Wright v. Hartsell, and instead based its decision on the Fifth Circuit cases. This however appears to be a departure from Wright v. Hartsell as the same principles are involved.

The more persuasive authority would, in the case before us, place the expenses of the taxpayer in getting to the work

site and returning to the place of residence in the personal expense category. There is no convincing way to distinguish these expenses from those of the suburban commuter. As the Supreme Court said in United States v. Correll, 389 U.S. 299, any rule in this area must make some rather arbitrary distinctions. The nature of the work engaged in, the distance traveled, the mode of transportation, the degree of "necessity" appear to be unsatisfactory guides with any degree of consistency and certainty. The basic and unmodified fact of whether the taxpayer is going to the place where he begins work or is returning from the place where he ceases work should be determinative. Such travels are expenses within section 262 as "personal, living or family expenses" whether in an urban, suburban, or rural setting. They are not ordinary business expenses under section 162(a). Thus the travel of the taxpayer here to and from his office at the Thiokol plant site was not deductible under section 162(a) nor under section 162(a)(2). Travel from place to place at work is not here involved.

The case is REVERSED with directions to deny the relief sought by the plaintiff below.

## APPENDIX B

Cite as 21 AFTR 2d 856.

**Lee W. TAUFERNER and Carolyn E. Tauferner, PLAINTIFFS**

**v.**

**UNITED STATES OF AMERICA, DEFENDANT**

U.S. District Court, Dist. of Utah, Central Div., No. C-225-66, Feb. 13, 1968.

Years 1961-1962. Decision for taxpayer.

**1. BUSINESS EXPENSES — Traveling expenses — local transportation.**

Business expense deduction allowed for expenses of traveling from home to job-site 27 miles away and back. Bus service was irregular and taxpayer couldn't find a residence any closer to employment. *Reference*: 1968 P-H Fed. ¶ 11,407(5).

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EksAyn Anderson, 608 El Paso Nat. Gas. Bldg., 315 E. 2nd St., Salt Lake City, Utah, Atty. for Plaintiffs.

William T. Thurman, U.S. Atty., Salt Lake City, Utah, JohnC. Rasp, U.S. Atty., Tax Div., Dept. of Justice, Wash., D.C., for Defendant.

Findings of Fact and Conclusions of Law

RITTER, Judge:

The above entitled cause came on regularly for trial on October 16, 1967, before the Court, the Honorable Willis W. Ritter, sitting without a jury, a jury having been waived, EksAyn Anderson, Esq. appearing as counsel for plaintiff, and William T. Thurman, United States Attorney, and John

C. Rasp, Esq., Tax Division, Washington, D.C., appearing for the defendant, and the Court having examined the Stipulation of the parties, and having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of facts as follows:

## Findings of Facts

1. This is an action for recovery of Federal income taxes in the amount of Eighty-One and 05/100 Dollars ($81.05), together with interest, as allowable by law. The Court has jurisdiction over this matter under the provisions of Title 28, United States Code, Section 1346.

2. The Plaintiffs are now, and at all times material to the above cause of action, have been residents of Brigham City, Utah, and are citizens of the United States of America.

3. The Plaintiffs duly filed their Federal income tax returns for the years 1961 and 1962 with the District Director of Internal Revenue, Salt Lake City, Utah.

4. On September 28, 1965, the Commissioner of Internal Revenue assessed a deficiency of income tax resulting from the disallowance of travel expense claimed on Plaintiffs' Federal income tax return in the amount of Twenty-Six and 96/100 Dollars ($26.96) for the taxable year 1961 and Forty-One and 23/100 Dollars ($41.23) for the taxable year 1962, plus interest, for a total of $81.05.

5. On February 7, 1966, the deficiency in tax and interest as assessed by the Commissioner of Internal Revenue was paid by the Plaintiffs.

6. On February 15, 1966, claims for refund of tax and interest were filed by the Plaintiffs with the District Director of Interual Revenue, Salt Lake City, Utah.

7. On August 15, 1966, the Commissioner of Internal Revenue, through his authorized agent, the District Director, disallowed in full the claims for refund referred to in paragraph 6.

8. Carolyn E. Tauferner is a Plaintiff in this cause of action solely because a joint return was filed in the years 1961 and 1962. Therefore, reference will be made solely to Lee W. Tauferner as the taxpayer hereafter.

9. Taxpayer began working for Thiokol Chemical Corporation, Wasatch Division, in May of 1961, and he worked continuously for the company during the remainder of 1961 and throughout 1962. His employment was of an indefinite nature and not of a temporary nature, as a Contracts Administrator.

10. The nature of the business activities of Thiokol is the manufacture and testing of solid fuel rocket engines. This is a hazardous operation which was the reason for locating the plant away from a community.

11. Tauferner was not permitted to live at the plant site.

12. Tauferner tried to be as close as possible to his employment. He tried to buy a home in Corinne, Utah, when he first began working at Thiokol, but was unable to find one available. He thereupon bought a home in Brigham City, Utah, in May, 1961, and has lived there with his wife and two children during the years 1961 and 1962, and ever since that

time. There was no place available other than in Brigham City.

13. The distance from the Thiokol Administration Building to the only towns in the vicinity of the company's location are listed below:

| *Cities* | *Mileage* | *Population as of 1963* |
|---|---|---|
| Corinne, Utah | 20.0 miles | 510 |
| Tremonton, Utah | 22.5 miles | 2,200 |
| Brigham City, Utah | 27.0 miles (north end of city limits) | 12,000 (approx.) |

14. It was stipulated that Taxpayer's nearest reasonable habitable place to the Thiokol Administration Building is Corinne, Utah. However, the testimony showed that public water is not available in Corinne; that the sewage system is inadequate there; and that there is not a motel in Corinne. There was no housing development in Corinne; that it was impossible to build in Corinne because of the water problem. Brigham City and Tremonton were the two closest communities where real estate brokers started to develop housing; primarily the housing development arising out of the Thiokol Plant was Brigham City. Corinne is the place where the railroads met and the golden spike was driven. Now it answers the description out in the west of "string town."

15. There were people living in the area if the Thiokol Plant closer than Corinne, but they were farmers who had their homes established there before the Thiokol Plant was built. Some of them worked at Thiokol.

16. Some public transportation to the Thiokol Chemical Corporation plant site was provided by Metro Transportation,

Inc. during the years 1961 and 1962 at the following round-trip rates:

| *From* | *Per Day* | *Weekly* |
|---|---|---|
| Brigham City, Utah | $.70 | $3.50 |
| Corinne, Utah | $.60 | $3.00 |

However, such service was limited. A passenger either caught the bus in the morning when it left Brigham City, or he didn't have a ride. It was not on a set, established schedule throughout the day. The bus did not go through the community of Corinne but by-passed on the highway, and a passenger had to be out on the highway to catch the bus. It would not always be possible to get a ride on the bus in Corinne because the bus would originate in Brigham City, and many times it was filled before it even left the north limits of Brigham City.

Sometimes Tauferner had difficulty in obtaining bus transportation from Brigham City to Thiokol, and when he did miss a bus, he took his automobile.

There was not adequate public transportation either from Brigham City or from Corinne to the Thiokol Chemical Corporation plant site.

17. During the years 1961 and 1962, there were approximately 4,000 individuals employed by the Thiokol Chemical Corporation at its plant, there being in excess of 6,000 employees in 1962 at the peak of the work force. At the present time there are approximately 2,000 individuals employed at the Thiokol Chemical Corporation plant.

18. The amount of expenses incurred by the taxpayer in traveling from his residence to the plant site and that such expenses are ordinary and reasonable are not disputed except in regards to their deductibility for Federal income tax pur-

poses within the provisions of Section 162 of the Internal Revenue Code of 1954.

From the foregoing facts, the Court concludes:

Conclusions of Law

[1] 1. That the taxpayers tax home is in Brigham City, Utah.

2. That the cost of travel from taxpayers' residence in Brigham City, Utah, to the Thiokol Chemical Corporation plant site is ordinary, necessary, and reasonable and, therefore, deductible for Federal income tax purposes within the provisions of Section 162 of the Internal Revenue Code of 1954.

3. That Plaintiffs are entitled to judgment in the amount of Eighty-One and 5/100 Dollars ($81.05), together interest as allowed by law.

Let judgment be entered accordingly.

Dated this 13 day of February, 1968. Willis W. Ritter, JUDGE.

Judgment

The above entitled cause came on regularly for trial on October 16, 1967, before the Court, the Honorable Willis W. Ritter, sitting without jury, a jury having been waived, Eks-Ayn Anderson, Esq., appearing as counsel for plaintiffs, and William T. Thurman, United States Attorney, and John C. Rasp, Esq., Tax Division, Washington, D.C., appearing for the defendant, and the Court having examined the Stipulation of the parties and having heard the testimony and having examined the proofs offered by the respective parties, and the

Court being fully advised in the premises, and having filed herein its Findings of Facts and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby Ordered, Adjudged and Decreed:

1. That Plaintiffs have judgment against the Defendant in the sum of Eighty-One and 05/100 Dollars ($81.05), together with interest as provided by law.

2. That Plaintiffs have judgment against the Defendant for his costs herein taxed at $.....

# APPENDIX C

Cite as 305 Fed. 2d 221

**Calvin E. Wright, District Director of Internal Revenue, Appellant**

**v.**

**Richard V. HARTSELL, Marjorie Hartsell, Appellees**

U.S. Court of Appeals, Ninth Circuit, No. 16,885, July 10, 1962, 305 F. 2d 221.

District Court, 5 AFTR 2d 833, 192 F. Supp. 725, affirmed.

Year 1955. Decision for taxpayer.

**1. BUSINESS EXPENSES — Traveling expenses — "away from home" — construction workers.**

"Away from home" traveling expense deduction allowed employee-construction worker for the entire expense of traveling to a temporary job, and for part of the expenses of traveling to jobs of indefinite duration. All the jobs were at an atomic energy construction site which was not fit for human habitation. "Home" as used in the statute should be given its ordinary and usual meaning. The term "trade or business" is not limited to the business of the employer; if travel expenses are connected directly with the employee's trade (as they were here), they are deductible. The fundamental question in determinating if an expense claimed as travel expense is incurred as a matter of choice or is dictated by the "exigencies of business" is whether it would be reasonable for the particular taxpayer to move his home nearer to the place where he is working. It was quite proper here to allow the taxpayer the costs of travel from the nearest place fit for habitation to his job site, for his jobs of indefinite duration, and the full costs of travel to his temporary job. It was also proper to

separate taxpayer s various jobs to one "temporary" job, and three jobs of "indefinite" duration, since there was no continuity to his employment. *Reference*: 1962 P-H Fed. ¶ 11,379-(20). '54 Code Sec. 162(a) (2).

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Louis F. Oberdorfer, Asst. Atty. Gen., Sylvan A. Jeppesen, U.S. Atty., Scott W. Reed, Asst. U.S. Atty., Meyer Rothwacks, and Kenneth E. Levin, both Attys., all with the Dept. of Justice, Tax Div., Wash., D.C., and Melvin Sears, Office of Regional Counsel, Internal Revenue Service, San Francisco, Calif., for Appellant.

Johnson and Olson, L. Charles Johnson, and Callis A. Caldwell, Pocatello, Idaho, Martin F. O'Donoghue, and Donald J. Capuano, Wash. D.C., Attys., for Appellee.

On Appeal from the United States District Court for the District of Idaho, Eastern Division.

Before POPE, HAMLEY and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge:

This is another of those numerous cases involving the question whether a construction worker, in computing his income subject to tax, is entitled to deduct expenses incurred in traveling to and from work. The facts are undisputed. Richard V. Hartsell is a non-itinerant journeyman pipe-fitter and plumber. Beginning in 1950 he has continuously maintained his regular place of abode in Pocatello, Idaho. He is a member of the local union for his trade and has secured employment solely through the hiring hall that the union maintains at Pocatello. He has not been continuosly employed by any one concern, nor has he worked in any particular locality. Rather, he has had numerous jobs with different employers and has

worked not only in and near Pocatello, but also at other places, as far away as 90 miles. His rate of pay was not affected by the distance of the work from Pocatello, but whenever he was required to travel more than five miles then the job was regarded as outside the so-called "free-zone" and he was paid a fixed sum as compensation for the extra travel.

All Hartsell's jobs from June 1954 until June 1956 were at the Atomic Energy Commission site in Southeastern Idaho, where the Federal Government is conducting atomic research. He was a construction worker and was employed by contractors who were engaged in various construction projects. In this two-year period he had four jobs with three different contractors. His first job was with J. F. Pritchard and Company and lasted from June 1954 until April 1955; he next worked three weeks for Morrison-Knudsen Co., Inc.; then from July to September 1955 he again worked for Pritchard and finally from October until the following June, he was employed by Kaiser Engineers.

Each time, save the last, when he voluntarily quit, his "lay-off" was due to the reduction of the size of the crew or the completion of the particular project; and on each occasion, when he found himself out of work, he reported to the union hiring hall and after some interval of unemployment was referred to a new job.

The AEC site encompasses an area of more than 1,500 square miles situated in a vast desert remote from any town or place of habitation. It is 70 miles from Pocatello and 46 miles from the town of Arco. No one is allowed there except on business, and access into the grounds is gained by a single road with a control gate at the entrance. No living accommo-

dations were provided and no transportation was furnished for construction workers.

Hartsell traveled back and forth from Pocatello to his work each day. Some of the times he rode with others, and on other occasions he drove his own automobile. During 1955, the tax year in question, he made a total of 132 round trips to and from Pocatello, for which he received from his employers a travel allowance of $1,356. In his income tax return for that year filed jointly with his wife, Hartsell treated this sum as travel expense and deducted it from gross income, but the Commissioner disallowed the deduction. Thereupon the Hartsells paid the deficiency and commenced this action for a refund.

The district court found, in substance, that the Hartsells in fact maintained their home in Pocatello; that the nearest "habitable" community to the AEC site was Arco; that Hartsell's employment with Morrison-Knudsen Co. was "temporary" in nature; that his three jobs with the other two firms were each of "indefinite" duration, and that his travel allowance reflected no more than ordinary and reasonable cost of operating his automobile to and from Pocatello.

The court approved the deduction of the entire expense arising from the "temporary" job with Morrison-Knudsen Co., but limited the deduction in connection with the three jobs that were "indefinite" to the cost of driving from Arco to the work sites. It rendered judgment in favor of the Hartsells but for an amount less than they had sought. The Government alone appealed; the Hartsells filed no cross-appeal.

[1] Section 162(a) of the Internal Revenue Code of 1954 provides for the deduction of all ordinary and necessary

expenses paid or incurred during the taxable year in carrying on any trade or business; amongst those enumerated are:

> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business . . ."

In Flowers v. Commissioner, 326 U.S. 465, 470 [34 AFTR 301] (1946), the Supreme Court declared that,

> "Three conditions must be satisfied before a travel expenses deduction may be made . . . : (1) the expense must be a reasonable and necessary traveling expense as that term is generally understood. This includes such items as transportation fares, food and lodging expense while traveling. (2) The expenses must be incurred (while away from home). (3) The expense must be incurred in pursuit of business."

The Commissioner contends that the word "home" as it appears in section 162(a), connotes the regular post of duty of a taxpayer as well as his place of abode and that therefore, Hartsell's travel expenses were not deductible because they were not incurred away from "home." A number of courts have given the statute this construction and have said "home" is the equivalent of work home or principal place of duty. See Barnhill v. Commissioner, 148 F. 2d 913 [33 AFTR 1203] (4th Cir. 1945); Bixler v. Commissioner, 5 B.T.A. 1181 (1927); Lindsay v. Commissioner, 34 B.T.A. 840 (1936). But in Wallace v. Commissioner, 144 F. 2d 407 [32 AFTR 1209] (9th Cir. 1944), this court unequivocally declared that "home" as it is used in this statute should be given its ordinary and usual meaning, and held that the expenses of a taxpayer who regularly lived in San Francisco but visited Los Angeles on business, met the statutory requirement that she incur the expense while away from home. Accord, Coburn v. Commissioner, 138 F. 2d 763 [31 AFTR 827] (2nd Cir. 1943); Flow-

1945), rev'd on other grounds, 326 U.S. 465 [34 AFTR 301] (1946).

The Commissioner argues that a literal application of the Wallace doctrine would permit the use of commuting and other nondeductible personal expense to reduce taxable income, but we think that the third condition imposed by the statute clearly serves to prevent such a wrong result. By virtue of that requirement the cost of transportation, food and lodging is deductible only if directly related to the pursuit of a trade or business. This means that "[t]he exigencies of business rather than the personal convenience and necessities of this taxpayer must be the motivating factor." Flowers v. Commissioner, 326 U.S. 465, 474 [34 AFTR 301] (1945); or stated even more succinctly, "[t]he job, not the taxpayer's pattern of living, must require the travel." Carragan v. Commissioner, 197 F. 2d 246 [41 AFTR 1394] (1952).

Some of the circuits appear to read the Supreme Court's opinion in Flowers as extending the deduction only to expenses incurred by a taxpayer while pursuing an employer's business, and not to those due to the prosecution of his own trade or occupation. Commissioner v. Puerifoy, 254 F. 2d 483, [52 AFTR 1691] (4th Cir. 1957), aff'd 358 U.S. 50 [2 AFTR 2d 6055] (1958); Commissioner v. James, 260 F. 2d 99 [2 AFTR 2d 5927] (8th Cir. 1958). But we see no warrant for such a construction and conclude both types of expenses are embraced by the statute. See Chandler v. Commissioner, 226 F. 2d 467 [48 AFTR 273] (1st Cir. 1955); Rev. Rul. 189, 1960-1 Cum. Bull. 60, 62. The statute expressly refers to "trade" as well as "business" expenses and states both may be deducted; and although the Supreme Court held that the expenses under consideration were not allowable because they

were not necessitated by the employer's business, nevertheless, the Court also recognized that the third condition was met if there was "a direct connection between the expenditures and the carrying on of the trade or business of the taxpayer or of his employer." Moreover, in Flowers the expenses were clearly non-deductible personal expenses whether considered with reference to the employer's business or the taxpayer's profession.

Where it appears probable that a taxpayer's employment outside the area of his regular abode will be "temporary" or will extend over but a "short" period of time, then his travel expenses are held to be deductible; conversely, if the prospects are that his work will continue for an "indefinite" or "intermediate" or "substantially long" period then the deduction is disallowed. Burns v. Gray, 287 F. 2d 698 [7 AFTR 2d 847] (6th Cir. 1961); Claunch v. Commissioner, 264 F. 2d 309 [3 AFTR 2d 906] (5th Cir. 1959); Commissioner v. Puerifoy, 254 F. 2d 483 [52 AFTR 1691] (4th Cir. 1957), aff'd 358 U.S. 59 [2 AFTR 2d 6055] (1958), with Harvey v. Commissioner, [infra] supra.[1] The Commissioner has acquiesced in the dis-

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[1] More precisely, the distinction has customarily been drawn between "temporary" and "indefinite" employment and in Harvey we drew the distinction between "substantially long" and "substantially short" employment. The Harvey decision did not reject the distinction which had been developed by other courts, but rather rejected the restrictive method in which it had been applied. Other courts have engaged in the practice of basing the deductibility question on whether the taxpayer was away from home for an "indefinite" period of time, thus assuming that the taxpayer should be expected to change his residence unless he could foresee the termination of his job within a reasonably short period of time. In Harvey, we held that the taxpayer should not be expected to change his residence unless he expects to be employed elsewhere for a reasonably long period of time. Thus, the difference between the positions proceeds from a conception of the human instincts which most

tinction between "indefinite" and "temporary" employment and has permitted deductions in the latter instance. Rev. Rul. 189, 1960-1 Cum. Bull. 60, 65.

Similarly, deductions are allowed to a public official who is required by law to maintain his actual residence in his home district, but perform his official duties elsewhere. United States v. LeBlanc, 278 F. 2d 571 [5 AFTR 2d 1460] (5th Cir. 1960); Moss v. United States, 145 F. Supp. 10 [50 AFTR 467] (W.D.S.C. 1956); Emmert v. United States, 146 F. Supp. 322 [50 AFTR 910] (S.D. Ind. 1955).[2] Likewise, a taxpayer who is employed in two widely separated localities is allowed his expenses in traveling to one for the reason that he would be unable to perform his duties without such travel. Chandler v. Commissioner, 226 F. 2d 467 [48 AFTR 273] (1st

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reasonably govern the members of our society, and perhaps more than other courts, we regarded these instincts as ones of stability rather than mobility.

The present case was decided by the district court before we reached our decision in Harvey, and thus the district court relied on the distinction between "temporary" and "indefinite" employment in individually classifying the duration of taxpayer's jobs. But we cannot reconsider the validity of these findings because the question is not before us on this appeal. The Commissioner has not charged the district court with improperly assessing the facts in concluding that one job was "temporary"; the taxpayer did not file a cross appeal to challenge the judgment which was based on the court's conclusion that the other jobs were "indefinite". "While a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, see Helvering v. Gowran, [302 U.S. 238 (19 AFTR 1226) (1937)], an appellee cannot without a cross-appeal attack a judgment entered below." Helvering v. Pfeiffer, 302 U.S. 247, 251 [19 AFTR 1231] (1937); see also, Egan v. Teets, 251 F. 2d 571, 576 (9th Cir. 1957).

[2] An opposite result was reached in Barnbill, supra, and in Lindsay v. Commissioner, 34 B.T.A. 840, 1936. But there the courts found that the taxpayers as a matter of choice, and not because of legal compulsion, maintained their residences in their home districts.

Cir. 1955); Sherman v. Commissioner, 16 T.C. 332 (1951); Brown v. Commissioner, 13 B.T.A. [8] 32 (1928). Here again the Commissioner has acquiesced. Rev. Rul. 189, 1960-1 Cum. Bull. 60, 62; Rev. Rul. 604, 1955-2 Cum. Bull. 49; Rev. Rul. 147, 1954-1 Cum. Bull. 51.

The Commissioner, however, argues that the above instances are the only one in which the deduction can be allowed and urges that in this case it is immaterial that the expenses were incurred, because Hartsell was unable to live at or near the AEC site.[3] We are unable to agree. The fundamental question in determining if an expense claimed as travel expense is incurred as a matter of choice or is dictated by the "exigencies of business" is whether it would be reasonable for the particular taxpayer to move his home nearer to the place where he is working. Harvey v. Commissioner, 283 F. 2d 491 [6 AFTR 2d 5780] (9th Cir. 1960); Barnhill v. Commissioner, 148 F. 2d 913 [33 AFTR 1203] (4th Cir. 1945). It is difficult to conceive of a situation which makes it more necessary for a taxpayer to incur travel expenses than the unfitness of the work area for civilized habitation. Such a taxpayer has less choice with respect to his place of abode than the taxpayer who prefers not to live in his work area simply because of the temporary nature of his employment there; his situation is similar to that of the public official who must maintain his home elsewhere, or of the taxpayer with two widely separated jobs, who obviously cannot live simultaneously in both localities. We conclude that a taxpayer's inability to live near his

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[3] In Bercaw v. Commissioner, 165 F. 2d 521, [36 AFTR 659] (4th Cir. 1948); York v. Commissioner, 160 F. 2d 385 [35 AFTR 996] (D.C. Cir. 1947); and the many other cases cited by the Commissioner in support of his argument, such a ground was neither contended for by the parties nor was it the subject of judicial comment.

job site is a valid ground for deduction as travel expense of the resulting cost of his transportation, food and lodging.[4] See, Crowther v. Commissioner, 269 F. 2d 292 [4 AFTR 2d 5295] (9th Cir. 1959). This is not to suggest that a taxpayer need not mitigate his expense by moving as near to the job site as is reasonable; the amount of the deduction must be gauged in that light. Here the district Court followed this rule in assessing the refund and its finding that Arco was the nearest habitable community to the AEC site and is supported by the record.

The Commissioner's final point is directed toward the trial court's action in separately classifying each of Hartsell's four jobs either as indefinite or temporary. He argues that the trial court should have made but one finding to the effect that Hartsell's employment at the site was of indefinite duration and that the court's error in not viewing the entire employment was prejudicial because on the basis of the finding that the job with Morrison-Knudsen Co. was temporary, Hartsell was allowed to deduct the entire travel expense incurred in pursuing that job.

We agree with the Commissioner that the determination of a taxpayer's employment in a particular geographical area requires the consideration of all the taxpayer's job prospects. But it does not follow that the court, as finder of fact, must make a single finding regarding the duration of his employment and that the travel expense must be either denied or allowed in its entirety. The crucial problem, we reiterate, is

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[4] There was evidence that a place called Atomic City was located between the AEC site and Arco; it apparently consisted of a "Couple of saloons", a service station and a few trailer houses at the side of the road and could hardly be considered a "habitable place."

whether a taxpayer's job prospects make it feasible for him to maintain his home near his job site. It is conceivable that these prospects may change from time to time and this is particularly true in the case of the construction worker. Here the court, in effect, found that Hartsell had no prospect of employment beyond the period of the termination of his then current job and on this record such a finding is amply supported. There was no continuity in Hartsell's employment; it was composed of several separate jobs; he performed work on different parts of the projects and was employed at various times by different contractors. Moreover, after each lay-off Hartsell was available for work anywhere throughout Southeastern Idaho; in every instance following a "lay-off" Hartsell was unemployed for an appreciable period of time before securing another job; in every instance he was referred to a job through the union hiring hall; it is true that he was sent back to the AEC site, but he might equally have been directed to any of a number of different localities. It simply appears fortuitous that his work during the period in question was at the AEC site.

The judgment is Affirmed.

# APPENDIX D

Cite as 326 U.S. 465, 66 S. Ct. 250

## COMMISSIONER OF INTERNAL REVENUE v. FLOWERS

No. 145.

Argued Dec. 11, 12, 1945.
Decided Jan. 2, 1946.
Rehearing Denied Jan. 28, 1946.
See 326 U.S. 812, 66 S. Ct. 482.

**1. Internal revenue — Key 233, 235**

The section of the Revenue Code authorizing deduction from gross income of traveling expenses while away from home in the pursuit of a trade or business must be contrasted with the section disallowing deductions for personal, living or family expenses, and read in the light of the interpretation given it by the Treasury Regulations. 26 U.S.C.A. Int. Rev. Code, §§ 23(a)(1)(A), 24(a)(1).

**2. Internal revenue — Key 153, 172**

The Treasury Regulation giving section of the Revenue Code authorizing deduction from gross income of traveling expenses while away from home in the pursuit of a trade or business the same construction as that given identical prior Revenue Act provisions must be deemed impliedly approved by Congress and to have the effect of law. 26 U.S.C.A. Int. Rev. Code, § 23(a)(1)(A).

**3. Internal revenue — Key 555**

In order that traveling expenses while away from home in the pursuit of a trade or business may be deducted from gross income, the expense must be incurred while away from

home and must be a reasonable expense necessary or appropriate to the development and pursuit of a trade or business. 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

**4. Internal revenue — Key 1638**

Whether traveling expenses while away from home in the pursuit of a trade or business may be deducted from gross income is ordinarily a question of fact for the Tax Court whose decision should not be disturbed on appeal. 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

**5. Internal revenue — Key 1633**

The Tax Court's decision disallowing deduction from gross income of alleged traveling expenses of railroad attorney on ground that there was no necessary relation between the expenditures and the railroad's business, must be sustained if supported by the evidence, even if there was implicit in the decision the court's definition of "home" and the definition was erroneous. 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

**6. Internal revenue — Key 555, 1690**

Where railroad attorney preferred to live in Mississippi rather than in another state where railroad's principal office was located, and attorney's duties required frequent trips to railroad's principal office, Tax Court's finding that the necessary relation between expenses of such trips and the railroad's business was lacking, was sustained by the evidence and its decision denying deductions from attorney's gross income of such expenses was proper. 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

**7. Internal revenue — Key 555**

Where railroad's principal place of business was in Ala-

bama and its attorney for personal reasons lived in Mississippi, traveling expenses deductible from attorney's gross income could arise only when the railroad's business forced attorney to travel and live temporaily at some place other than the railroad's principal place of business. 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

Mr. Justice RUTLEDGE, dissenting.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Certiorari by Commissioner of Internal Revenue to review a judgment of the Circuit Court of Appeals, 148 F. 2d 163, reversing a decision of the Tax Court of the United States, redetermining income tax deficiencies for 1939 and 1940 of J. N. Flowers, imposed by the Commissioner of Internal Revenue.

Judgment reversed.

Mr. J. Louis Monarch, of Washington, D. C., for petitioner.

Mr. J. N. Ogden, of Mobile Ala., for respondent.

Mr. Justice MURPHY delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of § 23(a) (1) (A) of the Internal Revenue Code[1] allowing a deduction for income tax purposes

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[1] 26 U.S.C. § 23(a) (1) (A), as amended, 56 Stat. 819, 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

"§ 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Mississippi, since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly thirty years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in

"(a) Expenses.

"(1) Trade or business expenses.

"(A In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Mobile, Alabama, as was also the main office of its predecessor. When offered the position of general solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the federal court

in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $920 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F. 2d 163, and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in Barnhill v. Commissioner, 148 F.2d 913.

[1,2] The portion of § 23 (a) (1) (A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted

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[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

with the provision of § 24(a)(1) of the Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code, § 24(a)(1), disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by Sec. 19.23 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied legislative approval and to have the effect of law. Helvering v. Winmill, 305 U.S. 79, 59 S. Ct. 45, 83 L. Ed. 52; Boehm v. Commissioner, 326 U.S. 287, 66S. Ct. 120. In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including ralroad fares, meals, and lodging, are business expenses. * * * Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. * * * Commuters' fares are not considered as business expenses and are not deductible."

[3] Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This

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[3] Article 23(a)-2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101(a) of Regulations 62.

includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

[4] Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See Commissioner v. Heininger, 320 U.S. 467, 475, 64 S. Ct. 249, 254, 88 L.Ed. 171. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. Commissioner v. Scottish American Co., 323 U.S. 119, 65 S. Ct. 169; Dobson v. Commissioner, 320 U.S. 489, 64 S. Ct. 239, 88 L. Ed. 248.

In this instance, the Tax Court without detailed elaboraton concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted the Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under § 23 (a) (1) (A). The Tax

Court, it was said, erroneously construed the word to mean the post, station or place of business where the taxpayer was employed—in this instance Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The Court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." 148 F.2d at page 164. Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in § 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82. The Tax Court[4] and the administrative rulings [5] have consistently defined it as the equivalent of the taxpayer's place of business.

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[4] Bixler v. Commissioner, 5 B.T.A. 1181; Griesemer v. Commissioner, 10 B.T.A. 386; Brown v. Commissioner, 13 B.T.A. 832; Duncan v. Commissioner, 17 B.T.A. 1088; Peters v. Commissioner, 19 B.T.A. 901; Lindsay v. Commissioner, 34 B.T.A. 840; Powell v. Commissioner, 34 B.T.A. 655; Tracy v. Commissioner, 39 B.T.A. 578; Priddy v. Commissioner, 43 B.T.A. 18; Schurer v. Commissioner, 3 T.C. 544; Gustafson v. Commissioner, 3 T.C. 998.

[5] Section 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible "necessarily rests on the premise that "home" for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty Sec. e.g. O.D. 1021, 5 Cum. Bull. 174 (1921); I.T. 1264, I-1 Cum. Bull. 122 (1922); I.T. 3314, 1939-2 Cum. Bull. 152; G.C.M. 23672, 1943 Cum. Bull. 66.

See Barnhill v. Commissioner, supra, 4 Cir. On the other hand the decision below and Wallace v. Commissioner, 9 Cir., 144 F.2d 407, have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also Coburn v. Commissioner, 2 Cir., 138 F.2d 763.

[5] We deem it unnecessary here to enter into or decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the Tax Court's definition of the word "home" was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

[6] Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the

necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the ralroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile, or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

([7] Travel expenses in pursuit of business within the meaning of § 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in rela-

tion to business demands, and the travelers business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of the Tax Court.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE, dissenting.

I think the judgment of the Court of Appeals should be affirmed. When Congress used the word "home" in § 23 of the Code, I do not believe it meant "business headquarters." And in my opinion this case presents no other question.

Congress allowed the deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." Treasury Regulations 103, § 19.23(a)-1, are to the same effect, with the word "solely" added after "home." Section 19.23(a)-2 also provides Commuters' fares are not considered as business expenses and are not deductible." By this decision, the latter regulation is allowed, in effect, to swallow up the deduction for many situations where the regulation has not fit application.

Respondent's home was in Jackson, Mississipi, in every sense, unless for applying § 23. There he maintained his family, with his personal, political and religious connections; schooled his children; paid taxes, voted, and resided over many years. There too, he kept hold upon his place as a lawyer, though not substantially active in practice otherwise than to perform his work as general counsel for the railroad. This re-

quired his presence in Mobile, Alabama, for roughly a third of his time. The remainder he spent in Jackson at the same work, except for the time he was required to travel to points other than Mobile.

The company's principal offices were there, including one set aside for respondent's use. But the bulk of its trackage was in Mississippi and much of its legal work, with which he was concerned, was done there. His choice to keep his home in Jackson must have been affected by this fact, although it was motivated chiefly by more purely personal considerations. It is doubtful indeed, though perhaps not material, whether by not moving to Mobile he did not save the Government from larger deductions on account of traveling expense than those he claimed.

There is no question therefore but that respondent's home was in Jackson for every purpose, unless for the single one of applying § 23. Nor is it in doubt that he traveled from Jackson to Mobile and return, as he claimed, or that he spent the sums deducted for that purpose, including meals and lodging. Neither is it denied, as matter of fact, that his sole reason for going to Mobile was to perform his work as it required his presence there or that he returned to his home in Jackson periodically when his duties no longer required him to be in Mobile.

I think this makes a case squarely within the statute and the regulations. But the Tax Court ruled that the claimed deductions were "personal, living, or family expenses." Because the taxpayer elected to keep his home in Jackson, rather than move to Mobile, and because his employer did not undertake to pay these expenses, it viewed the case as being the same as if he had moved to Mobile. In that event, it said, he

would have been required to bear the expenses of his own meals and lodging. This is obvious, even though the "as if" conclusion does not follow. The court went on, however, to give the further reason for it: "The situation * * * is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It seems questionable whether, in so ruling, the Tax Court has not confused the taxpayer's principal place of employment with his employer's. For on the facts Jackson rather than Mobile would seem more appropriately to be found *his* business headquarters. But regardless of that, the authorities cited[1] and the Government's supporting argument show that the case was regarded as in essence the commuter's, excepted by the regulations.

Apart from this ruling, the Tax Court made no finding of fact or law, that respondent was not engaged "in the pursuit of a trade or business"; that he was not "away from home"; that the expenses were not "business expenses" or "business traveling expenses"; or that they were not "ordinary and neces-

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[1] Frank H. Sullivan, 1 B.T.A. 93; Mort L. Bixler, 5 B.T.A. 1181; Jennie A. Peters, 19 B.T.A. 901; Walter M. Priddy, 43 B.T.A. 18.

The Sullivan case illustrates the typical commuter situation. The Peters case illustrates the extension of that ruling to greater distances and irregular travel.

Recent decisions, however, where the traveling distance is great, appear to go on the theory, presented in the instant case, that the word "home" within the meaning of § 23(a) (1) means "principal place of business." See Tax Court Memorandum Opinion, Dec. 13,853(M), 1 C.C.H. Tax Serv. 1945, p. 1268. Thus, Mertens says that the disallowance of traveling expenses to one's place of business "is based primarily on the requirement that the traveling expenses include only amounts expended 'while away from home.'" 4 Mertens, Law of Federal Income Taxation 478.

sary." Yet by a merry-go-round argument,[2] which always comes back to rest on the idea that "home' means "business headquarters," the Government seeks to inject such issues and findings, including a Dobson v. Com'r, 320 U.S. 489, 64 S. Ct. 239, 88 L.Ed. 248, contention, into the Tax Court's determination. I think there was only one issue, a question of law requiring construction of the statute as to the meaning of the word "home" and, if that is resolved against the Government, the Tax Court's judgment has no other foundation on which to stand. Every other contention falls when this one does. All stand if it is valid.

I agree with the Court of Appeals that if Congress had meant "business headquarters," and not "home," it would have said "business headquarters." When it used "home" instead, I think it meant home in everyday parlance, not in some twisted special meaning of "tax home" or "tax headquarters."[3] I find no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion or to use § 23 as a lever to force people to move their homes to the locality where their employer's business headquarters may be, although

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[2] Thus, the assertion that the deductions were "not even 'business' expenses" is brought back to the meaning of "home" by the given reason that "the maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business." And this, in turn, completes the circle by resting on the conclusion that the taxpayer had two dwelling places, one in Mobile (presumably the hotels or hotels where he stopped) "where he resided during the periods the living expenses in question were incurred," the other in Jackson "where he resided during other periods." Likewise, the conclusion that the deductions were not "ordinary and necessary expenses," see note 8, depends on the view that Jackson was not "home" but Mobile was. So with the assertion that the "Mobile living expenses" were not "business traveling expenses."

[3] Cf. Cox v. Lott, 12 Wall. 204, 20 L. Ed. 370; Addison v. Holly Hill Co., 322 U.S. 607, 617, 618, 64 S. Ct. 1215, 1221, 88 L.Ed. 1488.

their own work may be done as well in major part at home. The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.

The Government relies on administrative construction, by the Commissioner and the Tax Court, and says that unless this is accepted the Act creates tax inequality. If so, it is inequality created by Congress, and it is not for the Commissioner or the Tax Court, by administrative reconstruction, to rewrite what Congress has written or to correct its views of equality. Moreover, in my opinion, the inequity, if any, comes not from the statute of regulation but from the construction which identifies petitioner with a commuter.

That word too has limitations unless it also is made a tool for rewriting the Act. The ordinary, usual connotation, cf. 21 I. C.C. 428; Pennsylvania R. Co. v. Towers, 245 U.S. 6, 12, 38 S. Ct. 2, 4, 62 L.Ed. 117, L.R.A. 1918C, 475, does not include irregular, although frequent journeys of 350 miles, requiring Pullman accommodations and some twelve to fitfeen hours, one way.

Congress gave the deduction for traveling away from home on business. The commuter's case, rightly confined, does not fall in this class. One who lives in an adjacent suburb or city and by usual modes of commutation can work within a distance permitting the daily journey and return, with time for the day's work and a period at home, clearly can be excluded from the deduction on the basis of the section's terms equally with its obvious purpose. But that is not true if "commute" is to swallow up the deduction by the same sort of construction which makes "home" mean "business headquarters" of one's employer. If the line may be extended somewhat to cover doubt-

ful cases, it need not be lengthened to infinity or to cover cases as far removed from the prevailing connotation of commuter as this one. Including it pushes "commuting" too far, even for these times of rapid transit.[4]

Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of non-technical terms not artfully employed. Moreover, in this case the matter has been held in suspension by litigation with varying results[5] and apparent qualification by the Tax Court consequent upon some of the decisions.[6]

By construing "home" as "business headquarters"; by reading "temporarily" as "very temporarily" into § 23; by bringing down "ordinary and necessary" from its first sentence into its second;[7] by finding "inequity"[4] where Congress

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[4] Conceivably men soon may live in Florida or California and fly daily to work in New York and back. Possibly they will be regarded as commuters when that day come. But, if so, that is not this case and, in any event, neither situation was comprehended by Congress when § 23 was enacted.

[5] See Wallace v. Commissioner, 9 Cir., 144 F.2d 407; Coburn v. Commissioner, 2 Cir., 138 F.2d 763; and the decision now in review, 5 Cir., 148 F.2d 163, with which compare Barnhill v. Commissioner and Winborne v. Commissioner, 4 Cir., 148 F. 2d 913.

[6] See Harry F. Schurer, 3 T.C. 544; Charles G. Gustafson, 3 T.C. 998; Mortimer M. Mahoney, C.C.H. Tax Ct. Serv., Dec. 14,508(M), April 10, 1945; Charles J. McLennan, C.C.H. Tax Ct. Serv., Dec. 14, 644(M), June 25, 1945; Robert S. Shelley, deceased, C.C.H. Tax Ct. Serv., Dec. 15,642 (M), June 25, 1945.

[7] The language is: "All the ordinary and necessary expenses paid or incurred during the taxable years in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home

has said none exists; by construing "commuter" to cover long-distance, irregular travel; and by conjuring from the "statutory setting" a meaning at odds with the plain wording the clause, the Government makes over understandable ordinary English into highly technical tax jargon. There is enough of this in the tax laws inescapably, without adding more in the absence of either compulsion or authority. The arm of the tax-gatherer reaches far. In my judgment it should not go the length of this case. Congress has revised § 23 once to overcome niggardly construction.[8] It should not have to do so again.

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in the pursuit of a trade or business; * * * ." § 23(a) (1) (A), Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

[8] The Treasury Regulations in force in 1920 allowed deduction of only the excess of the cost of meals and lodging away from home over the cost at home; and under earlier regulations none of this expense was allowed. Congress inserted the words "all" and "entire" in the 1921 Act to overcome this ruling.

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No. 156

# In the Supreme Court of the United States

OCTOBER TERM, 1969

LEE W. TAUFERNER AND CAROLYN E. TAUFERNER,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 156

LEE W. TAUFERNER AND CAROLYN E. TAUFERNER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The district court's findings of fact and conclusions of law (Pet. B–1–B–6) are not officially reported. The opinion of the court of appeals (Pet. A–1–A–7) is reported at 407 F. 2d 243.

### JURISDICTION

The judgment of the court of appeals was entered on February 24, 1969. The petition for a writ of certiorari was filed on May 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTION PRESENTED

May petitioner deduct his expenses of commuting between his residence and the plant where he worked, which was located away from any community because of the dangerous nature of its business activities, as ordinary and necessary business expenses pursuant to Section 162(a) of the Internal Revenue Code of 1954?

## STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 62, 162, and 262 of the Internal Revenue Code of 1954, and of Sections 1.62–1, 1.162–2 and 1.262–1 of the Treasury Regulations on Income Tax (1954 Code), are set forth in the Appendix, *infra,* pp. 7–10.

## STATEMENT

Petitioner was employed at a plant where solid fuel rocket engines were tested and manufactured. Because of the danger of the activity, the plant was located in a desert area in Utah 20 miles away from the nearest community. Petitioner was unable to find suitable housing in that community and purchased a residence in Brigham City, Utah, situated 27 miles from the plant. Usually he traveled to and from work by public bus transportation at a fare of 70 cents round trip. At other times, he traveled by car. His employment at the plant was regular and permanent or of indefinite duration. (R. 41–44; Pet. A–2.) [1]

In computing his tax liability for the years 1961 and 1962, petitioner deducted the transportation expenses incurred in travelling between his residence

[1] "R." refers to the record on appeal.

and the plant. The Commissioner of Internal Revenue disallowed the deduction and issued a deficiency notice. Petitioner paid the tax, and his later claims for refund were denied. On his refund action (R. 1–11, 41; Pet. A–1–A–2) the district court held that the expenses in question were deductible either as ordinary and necessary business expenses or as travel expenses (R. 44; see also R. 93, 100–101; Pet. B–6). The court of appeals reversed (Pet. A–7).

ARGUMENT

The decision of the court of appeals is clearly correct. While there is a conflict in result with the Ninth Circuit's decision in *Wright* v. *Hartsell*, 305 F. 2d 221 (Pet. C–1–C–11), that conflict is no longer viable. Neither that conflict nor any other matter warrants review by this Court.

1. It is well established by long-standing Regulations[2] and by many cases,[3] including this Court's de-

[2] See Treasury Regulations 62 (1921 Act), Art. 101(a); Treasury Regulations 65 (1924 Act), Art. 102; Treasury Regulations 69 (1926 Act), Art. 102; Treasury Regulations 74 (1929 ed.), Art. 122; Treasury Regulations 77 (1932 Act), Art. 122; Treasury Regulations 86 (1934 Act), Art. 23(a)–2; Treasury Regulations 94 (1936 Act), Art. 23(a)–2; Treasury Regulations 101 (1938 Act), Art. 23(a)–2; Treasury Regulations 103 (1939 Code), Sec. 19.23(a)–2; Treasury Regulations 111 (1939 Code), Sec. 29.23(a)–2; Treasury Regulations 118 (1939 Code), Sec. 39.23(a)–2(i); Treasury Regulations on Income Tax (1954 Code), Secs. 1.62–1(g), 1.162–2(e) and 1.262–1(b)(5).

[3] *Sullivan* v. *Commissioner*, 1 B.T.A. 93; *Commissioner* v. *Flowers*, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C.A. 5) (and the cases there cited); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C.A. 5), affirming *per curiam*, 32 T.C. 947; *Smith* v. *Warren*, 388 F. 2d 671 (C.A. 9); *Sansone* v. *Commis-*

cision in *Commissioner* v. *Flowers*, 326 U.S. 465, that commuting expenses—the expenses a taxpayer incurs in traveling between his residence and his principal place of business—are not deductible either as business transportation or business traveling expenses. See *United States* v. *Cornell*, 389 U.S. 299, 303. Instead, these costs are nondeductible personal expenses within the scope of Section 262 of the Code. This general rule is applicable even to those commuting expenses which are unavoidably incurred, as here, because a taxpayer cannot reasonably live closer to his work than he does. See *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C.A. 5); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C.A. 5), affirming *per curiam*, 32 T.C. 957; cf. *Smith* v. *Warren*, 388 F. 2d 671 (C.A. 9). No exception could reasonably be made, for, as a matter of practical tax administration, there would be no feasible manner in which to determine which taxpayers had mitigated their commuting expenses by living as close to their work as was reasonably possible.[4]

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*sioner*, 41 T.C. 277, 290–291; *Verner* v. *Commissioner*, 39 T.C. 749, 755, 756 (1963); *Berhov* v. *United States* (D. Nebr.), decided February 26, 1968 (21 A.F.T.R. 2d 782).

[4] For example, it would be practically impossible to determine whether a New York taxpayer, employed in Manhattan, should attempt to locate his family in Manhattan instead of commuting from Westchester County or Long Island. Similar problems would arise for rural areas. For example, in the instant case, Corinne, Utah, located 20 miles from the plant was apparently uninhabitable for petitioner and his family (Pet. B–4) but might or might not be considered habitable for single or childless taxpayers, depending on their *personal* needs, financial and social status, and style of living. Any rule based upon such subjective and personal determinations of whether a given location was reasonably habitable for a particular taxpayer would clearly be unworkable.

2. In *Wright* v. *Hartsell, supra,* the Ninth Circuit held that a taxpayer could deduct the expenses he would have incurred in commuting between a remote Atomic Energy Commission site and the nearest town 46 miles away. This result was predicated on the court's assumption that the travel expense provision, Section 162(a)(2) of the Code, Appendix, *infra,* p. 8, applied to commuters on daily trips. However, this Court, in *United States* v. *Correll,* has since sustained the Commissioner's position that expenses incurred on one-day business trips are not deductible under Section 162(a)(2), but are in the same non-deductible category as commuting expenses. While the *Correll* case involved meal expenses, consistant construction of the "away from home" requirement of Section 162(a)(2) requires the same result for any other expenses claimed under Section 162(a)(2). See *Commissioner* v. *Bagley,* 374 F. 2d 204, 208, n. 11 (C. A. 1), certiorari denied, 389 U.S. 1046. Transportation expenses incurred on one-day business trips are deductible only as business transportation expenses under Section 162(a) (*Commissioner* v. *Bagley, supra,* p. 208) and commuting is not business travel (see, e.g., Secs. 1.62–1(g); 1.162–2(e), and 1.262–1(a)(5) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra,* pp. 8–10).[5] The intervention of this Court's decision in *Correll* thus makes it most unlikely that the Ninth Circuit would today follow *Wright* v.

[5] The validity of these long-standing regulatory provisions cannot be seriously disputed. *E.g., Johnson* v. *Bingler,* decided April 23, 1963 (37 U.S. Law Week 4365, 4367–4368); *United States* v. *Correll, supra* at 305–306. See fn. 3, *supra.*

*Hartsell*, and thereby strips the conflict of any significance. Moreover, in *Smith* v. *Warren*, *supra*, decided a month after this Court's decision in *Correll*, the Ninth Circuit made no mention of *Wright* v. *Hartsell*, and decided to (388 F. 2d, p. 673) "adhere to the principles of decision set out in the *Steinhort* and *Heuer*" decisions, *supra*.

3. There is no conflict between the decision below and this Court's decision in *Commissioner* v. *Flowers*, *supra*. In *Flowers*, this Court reiterated the fundamental point that commuting expenses, by their very nature, lack (326 U.S. at 473) "the necessary direct relation to the prosecution of the business" required for a deductible expense. As this Court there stated, because commuting expenses are motivated or occasioned by (*id* at 474) "the *personal* conveniences and necessities of the traveler" (emphasis supplied), rather than the "exigencies of business", they do not qualify as business travel expenses.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX

Internal Revenue Code of 1954:

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and Business Deductions of Employees.*—

* * * * *

(B) *Expenses for travel away from home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of service as an employee.

(C) *Transportation expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * * *

(26 U.S.C. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * *

(26 U.S.C. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.
(26 U.S.C. 262.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.62–1. *Adjusted gross income.*

* * * * *

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. "Transportation," as used in section 62(2)(C), is a narrower concept than "travel," as used in section 62(2)(B), and does not include meals and lodging. The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. Thus, transportation costs may include cab fares, bus fares, and the like, and also a pro rata share of the employee's expenses of operating his automobile, including gas, oil, and depreciation. All transportation

expenses must be allowable expenses under part VI (section 161 and following), subchapter B, chapter 1 of the Code, as ordinary and necessary expenses incurred during the taxable year in carrying on a trade or business as an employee. Transportation expenses do not include the cost of commuting to and from work: this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

* * * * * *

(26 C.F.R., Sec. 1.62–1.)

§ 1.162–2 *Traveling expenses.*

(a) * * * Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. * * *

* * * * * *

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * * * *

(26 C.F.R., Sec. 1.162–2.)

§ 1.262–1 *Personal, living, and family expenses.*

(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * * * * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other

transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not quality as deductible expenses. * * *

* * * * *

(26 C.F.R., Sec. 1.262–1.)

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